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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. [redacted]47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER ST. REGIS PAPER COMPANY

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT	3
SUMMARY OF ARGUMENT	10
ARGUMENT	14
CONCLUSION	41
APPENDIX:	
Texts of relevant statutes:	
Administrative Procedure Act:	
Section 6	1a
Section 10	2a
Census Act:	
Section 5	4a
Section 8	4a
Section 9	5a
Federal Trade Commission Act:	
Section 6	6a
Section 9	8a
Section 10	10a
Graphs Reproduced from Appendix to Government Brief In the Court of Appeals	1b

AUTHORITIES

Cases

PAGE

Bowman Dairy Co. v. *United States*, 341 U. S. 214 (1951) 17

Cudahy Packing Co. v. *Holland*, 315 U. S. 357 (1942) 24fn.

Ex parte Young, 209 U. S. 123 (1908) 37

Farmers' & Mechanics' National Bank v. *Dearing*, 91 U. S. 29 (1875) 25

Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160 (1927) 6, 12, 37, 38, 39, 40

Federal Trade Commission v. *Dilger*, 276 F. 2d 739 (7th Cir.), *cert. denied*, 364 U. S. 882 (1960) 12, 27, 29, 30, 31, 32, 33, 34, 36

Federal Trade Commission v. *Millers' National Federation*, 23 F. 2d 968 (D. C. Cir. 1927) ..... 24fn.

Federal Trade Commission v. *Millers' National Federation*, 47 F. 2d 428 (D. C. Cir. 1931) ..... 24fn.

Flotill Products, Inc. v. *Federal Trade Commission*, 278 F. 2d 850 (9th Cir.), *cert. denied*, 364 U. S. 891 (1960) 26

Hammond v. *Hull*, 131 F. 2d 23 (D. C. Cir. 1942), *cert. denied*, 318 U. S. 777 (1943) ..... 14fn.

Hannifin v. *United States*, 248 F. 2d 173 (9th Cir. 1957) 25

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447 (1894) 17

Maddox v. *Wright*, 103 F. Supp. 400 (D. C. 1952) 31

Missouri Pacific Ry. Co. v. *Tucker*, 230 U. S. 340 (1913) 37

Natural Gas Co. v. *Slattery*, 302 U. S. 300 (1937) 37

O'Connell et al. v. *Olsen & Ungelstadt et al.*, 50-2 USTC 9450 (N. D. Ohio 1949) 31

PAGE

Oklahoma Operating Co. v. *Love*, 252 U. S. 331 (1920) 37

Oklahoma Press Pub. Co. v. *Walling*, 327 U. S. 186 (1946) ..... 24fn.

St. Louis, Iron Mountain & Southern Ry. Co. v. *Williams*, 251 U. S. 63 (1919) 37

Securities and Exchange Commission v. *Morgan, Lewis & Bockius*, 113 F. Supp. 85 (E. D. Pa. 1953), *aff'd on other grounds*, 209 F. 2d 44 (3rd Cir. 1953) ..... 14fn.

United States v. *Bethlehem Steel Corporation*, 21 F.R.D. 568 (S. D. N. Y. 1958) 33

United States v. *National Biscuit Co.*, 25 F. Supp. 329 (S. D. N. Y. 1938) 26

United States v. *O'Mara*, 122 F. Supp 399 (D. C. 1954) ..... 30fn.

United States v. *One Ford Coach*, 307 U. S. 219 (1939) 25

Wadley Southern Ry. Co. v. *Georgia*, 235 U. S. 651 (1915) 37

Statutes

Administrative Procedure Act, 60 Stat. 237 (1946); 5 U.S.C. §§1001-1011 (1958):

§6(b), 60 Stat. 240 (1946); 5 U.S.C. §1005(b) (1958) ..... 17fn.

§6(c), 60 Stat. 240 (1946); 5 U.S.C. §1005(c) (1958) 2, 8, 10, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24

§10(d), 60 Stat. 243 (1946); 5 U.S.C. §1009(d) (1958) 9, 38, 39

Census Act, §5, 68 Stat. 1013 (1954); 13 U.S.C. §5 (1958) 28

PAGE

Census Act, §8, 68 Stat. 1013 (1954); 13 U.S.C. §8 (1958) 27, 28

Census Act, §9, 68 Stat. 1013 (1954); 13 U.S.C. §9 (1958) 27

Clayton Act, §7, 64 Stat. 1125 (1950); 15 U.S.C. §18 (1958) 3

Fair Labor Standards Act, §9, 52 Stat. 1065 (1938); 29 U.S.C. §209 (1958) ..... 24fn.

Federal Rules of Civil Procedure, Rule 17 17

Federal Rules of Civil Procedure, Rule 81(b) ..... 14fn.

Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§41-58 (1958):

§6, 38 Stat. 721 (1914); 15 U.S.C. §46 (1958); (b) 3, 11, 21, 23, 36, 38

§9, 38 Stat. 722 (1914); 15 U.S.C. §49 (1958) 6

§10, 38 Stat. 723 (1914); 15 U.S.C. §50 (1958) 3, 6, 10, 13, 23, 24, 26

Internal Revenue Code of 1954, 26 U.S.C. §6103 (Supp. II 1958) 30

Miscellaneous

S. Doc. 248, 79th Cong. 2d Sess. (1946) ..... 16fn.

Presidential Proclamation, November 22, 1929, 46 Stat. 3011-3012 28

36 Ops. Atty. Gen. 362 (1930) 29

Memorandum for the Secretary of Commerce submitted in opposition to the petition for writ of certiorari in *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739 (7th Cir.), *cert. denied*, 364 U. S. 882 (1960) 31

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No. 704

ST. REGIS PAPER COMPANY,

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v.

UNITED STATES OF AMERICA,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals[1] is reported at 285 F. 2d 607. The opinion of the District Court[2] is reported at 181 F. Supp. 862.

Jurisdiction

The judgment of the Court of Appeals was entered December 16, 1960.[3] The petition for writ of certiorari was filed February 7, 1961 and was granted March 27, 1961.[4] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[1] R. 218-233.
[2] R. 203-212.
[3] R. 234.
[4] R. 237-238.

Statutes Involved

The statutes involved are: the Federal Trade Commission Act, Sections 6, 9 and 10, 38 Stat. 721, 722 and 723 (1914), 15 U.S.C. §§46, 49 and 50 (1958); the Administrative Procedure Act, Sections 6(b), 6(c) and 10, 60 Stat. 240 and 243 (1946), 5 U.S.C. §§1005(b), 1005(c) and 1009 (1958); and the Census Act, Sections 5, 8 and 9, 68 Stat. 1013 (1954), 13 U.S.C. §§5, 8 and 9 (1958). They are printed in Appendix A *infra*, pp. 1a to 12a.

Questions Presented for Review

The questions arise from an action commenced by the United States (the "Government") for relief against petitioner in the nature of mandamus requiring petitioner to comply with investigative orders of the Federal Trade Commission (the "Commission") and for statutory forfeitures for the prior non-compliance with the Commission's orders. The District Court by order made pursuant to Section 6(c) of the Administrative Procedure Act[3] (a) required petitioner to answer a part (37%) of the questions contained in the Commission's orders, and (b) denied the claim for forfeitures. The Court of Appeals affirmed that portion of the judgment requiring petitioner to answer part of the questions, but reversed the District Court's dismissal of the claim for forfeitures. The questions presented are:

1. Does judicial action under Section 6(c) of the Administrative Procedure Act, modifying administrative agency investigative process, impose upon the recipient of the process liability for forfeitures for non-compliance with the original, unmodified agency process?

[3] 60 Stat. 240 (1946), 5 U.S.C. §1005(c) (1958).

2. Did the orders of the Commission, issued pursuant to Section 6(b) of the Federal Trade Commission Act,[6] constitute a requirement that petitioner furnish "answers in writing to specific questions", rather than a requirement to furnish a "special report", so that the provisions of the third unnumbered paragraph of Section 10 of the FTC Act,[7] providing for forfeitures in the sum of $100 per day for each day of failure to file a "report", have no application?

3. Are petitioner's retained file copies of confidential reports to the Bureau of Census for the Census of Manufactures subject to the investigative processes of the Commission?

4. Does the investigative power asserted by the Commission under Section 6(b) of the FTC Act, if not reviewable except at the risk of paying daily forfeitures accumulating throughout the period of non-compliance, including the period of judicial review, deprive petitioner of its liberty and property without due process of law?

Statement

In September 1956 the Commission sent to petitioner a letter requesting information to determine whether the acquisition by petitioner of the stocks of other corporations was in violation of Section 7 of the Clayton Act.[8] Although petitioner thereafter furnished the Commission a substantial volume of records and documents relating to the acquisitions, the Commission, in September 1957, issued

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[6] 38 Stat. 721 (1914), 15 U.S.C. §46(b) (1958). The Federal Trade Commission Act is hereinafter referred to as the "FTC Act".

[7] 38 Stat. 723 (1914), 15 U.S.C. §50 (1958).

[8] 64 Stat. 1125 (1950), 15 U.S.C. §18 (1958).

a subpoena *duces tecum* to petitioner.[9] Petitioner complied with the subpoena and in the course of hearings held in October, November and December 1957, delivered to the Commission additional documents, records and information constituting 213 separately marked exhibits, many of which were specially prepared to comply with the subpoena. At the final hearing on December 13, 1957, the Commission's attorney before whom the subpoena was returnable stated that all of the specifications of the subpoena had been complied with and declared that the "hearing is terminated".[10]

In June of the following year (1958) the Commission determined that it needed further information for its investigation and requested voluntary submission of additional information.[11] There was considerable correspondence and discussion between the Commission and petitioner with respect to this additional information, including discussion relating to the duplicative and confidential nature of the requested documents and the petitioner's offer to furnish certain information including names of large suppliers and customers by using symbols in lieu of names.[12]

Consequently, although a number of documents were furnished, some of the requested information was not.

In January 1959 the Commission, by resolution, instituted a formal investigation and issued six orders, one addressed to petitioner and five to its wholly-owned subsidiary corporations, setting forth several hundred separate questions to be answered by the addressees.[13]

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[9] R. 109-113.
[10] R. 157.
[11] R. 114-124.
[12] R. 124-162.
[13] R. 9-41.

Petitioner objected to these further requests on the grounds, among others, that they required the duplication of documents and information previously furnished and called for confidential information. Petitioner promptly moved before the Commission to vacate the Commission's orders and for other appropriate relief. Petitioner also requested an opportunity to be heard orally.[14]

After making orders denying petitioner the right to file a brief, in March 1959 the Commission vacated such orders and permitted petitioner to file a written brief limited to the question of duplication of information. The request for oral argument, however, was denied.[15]

In May 1959 the Commission denied petitioner's motion[16] and later denied a further motion for reconsideration.

On June 8, 1959 the Commission issued two more orders requesting answers in writing to questions addressed to two additional subsidiary corporations of petitioner and a third addressed to petitioner.[17]

On June 18, 1959 the Commission issued notices of default for failure to respond to the six January orders,[18] and on July 22, 1959 the Commission issued similar notices of default with respect to the three June orders.[19]

Following the denial of petitioner's application to the Commission to be heard orally, counsel for petitioner made several attempts to meet with Commission representatives in order to work out a reasonable compliance with

[14] R. 166.
[15] R. 168-169.
[16] R. 170.
[17] R. 44-53.
[18] R. 53-55, 175-187.
[19] R. 56-58, 188-191.

the Commission's orders.[20] These offers were rejected until, on September 4, 1959, in answer to the written request of petitioner's counsel for a meeting to discuss petitioner's proposal to commence an action in the district court for a declaratory judgment against the Commission, the Commission's general counsel indicated a willingness to meet with petitioner's counsel but stated that the Commission would object to the court's jurisdiction, citing *F.T.C.* v. *Claire Furnace Co.*, 274 U. S. 160 (1927).[21] On September 17, 1959, before such meeting could be held, the Government commenced this action.

The Government's complaint was stated in two separate counts. The first demanded relief under Section 9 of the FTC Act,[22] which provides for "writs of mandamus", to compel petitioner to comply with the two orders addressed to petitioner and the seven orders addressed to its subsidiaries. The second count demanded forfeitures pursuant to the third paragraph of Section 10 of the FTC Act for each day that petitioner was claimed to be in default of the two orders issued to it. Since the claim was based on two orders, the Government demanded forfeitures accumulating at the rate of $200 per day.[23]

After a trial on stipulated facts before Chief District Judge Sylvester J. Ryan, the greater part of the questions contained in the Commission's orders were held to be improper, in that they were too vague and indefinite or required petitioner to duplicate the "vast amount of information it has supplied."[24] Questions requiring the production of petitioner's file copies of reports for the Census of Manufactures, however, were held to be proper.

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[20] R. 193, 197.

[21] R. 200.

[22] 38 Stat. 722 (1914), 15 U.S.C. §49 (1958).

[23] R. 6.

[24] R. 210-211.

In the Government's brief in the Court of Appeals, copies of which were filed with the Clerk of this Court, there were included, at pages 31-40, tabulations analyzing in detail the contents of all of the nine orders of the Commission and noting the enforcement and enforceability, as well as petitioner's compliance. These tabulations were also summarized in four separate circular graphs, designated Figures 1 to 4, inclusive, at pages 27-30 of the Government's brief. Copies of these graphs are reproduced in Appendix B to this brief.

The graph designated Figure 3 deals with orders 1 and 7, the only orders addressed to petitioner and on which the claim for forfeitures rests. It shows that, according to the Government's figures, 63%[25] of the questions contained in these orders were not enforced and that only 37% were held to be enforceable and enforcement granted, including 3% representing the portion of the total requiring copies of reports for the Census of Manufactures, the confidential treatment of which is one of the questions to be reviewed here.

The District Court did not accede to petitioner's requests at the conclusion of the trial[26] that the matter be remanded to the Commission with directions to issue new orders in conformity with the Court's decision. Instead,

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[25] Comprised of 14% held invalid because vague and uncertain, 16% which had previously been expressly answered, 13% which had been answered by documents previously submitted to the Commission and which had been referred to in petitioner's post-trial memorandum and 20% which petitioner's post-trial memorandum pointed out either (a) had no application to petitioner's business or (b) required "information . . . contained at a certain page of some annual report or prospectus" which petitioner had previously furnished (Government brief in the Court of Appeals, p. 11, footnote 22). These figures are derived entirely from Figures 3 and 4 of the Appendix to the Government's brief in the Court of Appeals, reproduced in Appendix B to this brief.

[26] R. 202-203.

the District Court held that it would adopt a "more practical method of dealing with these orders"[27] by treating the Commission's orders as "subpena[s] or similar process or demand", within Section 6(c) of the Administrative Procedure Act and issued its own orders requiring "compliance with those portions of the orders which are enforceable and have not been answered."[28]

Since the District Court found that petitioner "had a valid reason for challenging these orders as prepared," it denied the Government's claim for forfeitures.[29]

The District Court also held that the Commission had statutory power to issue the orders.

The District Court entered an order and judgment directing petitioner to answer within 30 days all of the "unobjectionable"[30] questions except those requiring copies of reports to trade associations and copies of reports to the Census of Manufactures which were directed to be answered within 60 days.

Petitioner answered fully all questions to be answered in the 30-day period.

On the sixtieth day after the entry of the judgment, the Government served a notice of appeal to the Court of Appeals, appealing only from that portion of the District Court's judgment dismissing the Government's claim for forfeitures.[31] Petitioner thereupon filed a notice of cross-appeal from the portion of the judgment requiring the furnishing of answers to the specific questions set out in the District Court's judgment[32] and moved for a stay and

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[27] R. 210.
[28] R. 211.
[29] R. 212.
[30] R. 212.
[31] R. 217.
[32] R. 216.

suspension of the 60-day requirement of the District Court's order and judgment, which was granted. Subsequently the stay was extended by the Court of Appeals pending its disposition of the appeal.

In its notice of appeal the Government did not appeal from the District Court's refusal to enforce 63% of the questions contained in the two orders addressed to petitioner. The District Court's holding that a large majority of the questions were uncertain or called for information previously furnished is, therefore, not disputed.

Upon review by the Court of Appeals, the District Court's holdings that the Commission had power to issue its orders and that petitioner's retained file copies of census reports were not privileged under the Census Act were affirmed. But the Court of Appeals reversed the District Court's denial of the Government's claim for forfeitures.

Thereafter, petitioner moved the Court of Appeals for a stay of its mandate pending final review by this Court which was granted and which is presently in effect with respect to petitioner's obligation to respond to those questions requiring the furnishing of copies of census reports.[33]

Petitioner also moved in the Court of Appeals, pursuant to Section 10(d) of the Administrative Procedure Act[34] for postponement of the effective date of the Commission's actions until conclusion of judicial review. This motion was denied.[35]

Concurrently with the filing of the petition for a writ of certiorari, petitioner renewed in this Court its motion for an order postponing the effective date of the Commission's actions. The motion was granted "to the extent of

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[33] R. 235.

[34] 60 Stat. 243 (1946), 5 U.S.C. §1009(d) (1958).

[35] R. 235.

tolling, as of the filing of its petition on February 7, 1961, and pending this Court's disposition of the writ of certiorari, the further running and accumulation of forfeitures under §10 of the Federal Trade Commission Act.[36] Petitioner's liability for forfeitures accruing prior to February 7, 1961, is to abide the event of this litigation."[37]

SUMMARY OF ARGUMENT

I.

The Court of Appeals erred in holding that the order and judgment of a district court, pursuant to Section 6(c) of the Administrative Procedure Act, modifying partially invalid investigative orders of the Federal Trade Commission carries with it liability for penalties for the non-compliance with the Commission's original, unmodified agency order. The language of Section 6(c) and its legislative history show that invocation of this section by a district court does not result in liability for the non-compliance with the original, partially invalid investigative order of the administrative agency. If, *arguendo*, penalties can be adjudged for such non-compliance, such penalties should be discretionary and not mandatory, and the District Court below, finding that petitioner had a valid reason for resisting the orders, properly exercised its discretion to relieve petitioner of liability.

Moreover, even if the Court of Appeals were correct in holding that penalties for non-compliance with a partially invalid Federal Trade Commission investigative order are not only possible but mandatory when Section 6(c) of the Administrative Procedure Act is invoked by a district court, then, after so ruling, the Court should have re-

[36] 38 Stat. 723, 15 U.S.C. §50 (1958).

[37] R. 238.

manded the case to the District Court to determine whether or not, in the light of these mandatory penalties, the District Court would invoke Section 6(c) and order partial enforcement or would dismiss the action, thus requiring the Commission to issue a new order in conformity with the District Court's findings. From the record in this case, it is clear that the District Court chose modification only as a matter of convenience to the Commission, and it is reasonable to assume the District Court would have ordered dismissal had it known that if it ordered modification such order would also carry liability for penalties.

II.

Section 6(b) of the FTC Act, pursuant to which the Commission issued its orders, authorizes two different kinds of investigative orders, namely, orders requiring "annual or special reports" and orders requiring "answers in writing to specific questions." The statute imposing $100 per day forfeitures refers only to the failure to comply with orders requiring "annual or special reports". As in the case of a Federal Trade Commission subpoena, a failure to furnish "answers in writing to specific questions" is punishable only after a court order of enforcement is entered.

The orders sought to be enforced by the Government in this action did not require a report on a designated subject but consisted of hundreds of specific questions for which written answers were requested, many of which were merely demands for specified documents. Thus, the orders did not require a "special or annual report" and the statute creating liability for $100 per day forfeitures had no application.

Certainly, after the District Court reviewed the questions and made its own order enforcing only 37% of the questions, nothing remained but a series of specific questions for which answers in writing were requested.

III.

Petitioner's retained copies of reports to the Bureau of the Census are entitled to the same confidential treatment as the original copies of census reports furnished to the Bureau. The language of the Census Act, a presidential proclamation and the schedules themselves, published pursuant to congressional delegation of authority to the Department of Commerce to prescribe the form of the schedules, all compel this conclusion. The Court of Appeals' analogy to cases holding that retained copies of income tax returns are not entitled to confidential treatment is fallacious. The income tax cases are based on a section of the Internal Revenue Code which provides that income tax returns may be inspected upon the order of the President. The Census Act contains no such provision.

In *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739 (7th Cir.), *cert. denied*, 364 U. S. 882 (1960) the Court of Appeals for the Seventh Circuit considered this analogy and rejected it, holding that retained copies of the reports to the Bureau of the Census were confidential and not amenable to Commission investigative process. The memorandum for the Secretary of Commerce submitted in opposition to the petition for certiorari in *Dilger* indicates that the opinion in *Dilger* reflects a careful consideration of the language and purposes of the confidentiality provisions of the Census Act, neither of which were considered in the opinion below.

IV.

The recipient of a Federal Trade Commission investigative order can test the validity of the order only by awaiting mandamus proceedings brought by the Government, *Federal Trade Commission* v. *Claire Furnace Co.*,

274 U. S. 160 (1927). Where the mandamus proceedings are joined with a claim for statutory forfeitures under the third (unnumbered) paragraph of Section 10 of the FTC Act, the recipient of the order can obtain judicial review only at the risk of having to pay forfeitures accumulating at the rate of $100 per day throughout the entire period of judicial review in the event his objections are not sustained. This Court has held many times that judicial review conducted under such conditions is a denial of due process of law.

The Court of Appeals below erroneously held that the subsequent enactment of the Declaratory Judgment Act and the Administrative Procedure Act had vitiated the rule of *Claire Furnace* and that, accordingly, petitioner could have protected itself from a claim for forfeitures by taking action under those Acts.

If *Claire Furnace* has been overruled, and petitioner could have taken action under the Administrative Procedure Act, then the Court below erred in denying petitioner's motion under the Administrative Procedure Act for a postponement of the effective date of the Federal Trade Commission's order. On the other hand, if *Claire Furnace* has not been overruled, then, as the Court of Appeals acknowledged, the forfeiture sanction cannot "withstand attack on due process grounds."[38]

[38] R. 232.

ARGUMENT

I

The District Court, having exercised power under Section 6(c) of the Administrative Procedure Act to enforce only so much of an administrative agency's investigative process as it found "to be in accordance with law", was not required to impose penalties for non-compliance prior to judicial review.

In Count One of the complaint the Government claimed relief in the nature of mandamus[39] under Section 9 of the FTC Act to compel compliance with the nine Commission orders.[40]

Because a large part of the orders were defective, the District Court did not grant such relief. In order to avoid the delay and inconvenience attendant upon a dismissal of the action and the issuance of new Commission orders, the District Court treated the Commission orders as a "subpena" or other "similar process or demand" under Section 6(c) of the Administrative Procedure Act which permits judicial modification and enforcement of a partially void administrative "subpena or similar process or demand."[41] The Court issued its own order which

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[39] Although writs of mandamus were abolished by Rule 81(b) of the Federal Rules of Civil Procedure, the principles which apply in determining whether relief in the nature of mandamus should be granted were not changed by the Rule. *Hammond* v. *Hull*, 131 F. 2d 23 (D.C. Cir. 1942), *cert. denied*, 318 U. S. 777 (1943); *Securities and Exchange Commission* v. *Morgan, Lewis & Bockius*, 113 F. Supp. 85 (E.D. Pa. 1953), aff'd on other grounds, 209 F. 2d 44 (3d Cir. 1953).

[40] R. 1.

[41] The text of the section in relevant part is as follows:

> ". . . Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."

modified and, as modified, enforced parts of the Commission's orders. The Court said:[42]

> "Defendant urges that having found portions of the orders indefinite, we must strike down the entire set. From a practical point of view, this seems silly since it would require the Commission to redraw and reissue the same orders. We believe that ordering partial compliance is a more practical method of dealing with these orders and feel that Section 6(c) of the Administrative Procedure Act, 5 U.S.C.A. 1005 (c), affords us ample legal authority to modify these orders. (Cf. *N.L.R.B.* v. *Anchor Rome Mills*, 197 F. 2d 447; *F.C.C.* v. *Cohn*, 154 F. Supp. 899.)"

The District Court dismissed the forfeiture claim in Count Two of the complaint, holding that since many of the questions contained in the Commission's orders were objectionable, petitioner should not be penalized for resisting the orders in their original form, saying:[43]

> "• • • the orders on which the Government bottoms its claim for forfeitures are partially defective and since we only enforce those portions of the orders which we find unobjectionable, defendant had a valid reason for challenging these orders as prepared. Therefore, we find the Government has no right to forfeitures under the circumstances."

The Court of Appeals recognized that mandamus had not been granted and that, in the exercise of judicial power under Section 6(c) of the Administrative Procedure Act, the District Court had issued its own order.[44] Neverthe-

[42] R. 210.
[43] R. 212.
[44] R. 229.

less the Court of Appeals reversed the District Court's denial of forfeitures, holding that where partial enforcement power under Section 6(c) is exercised by a court, penalties must be adjudged for the recipient's non-compliance with the original, unmodified subpoena or similar process or demand during the period prior to and during judicial review. Without citing any authority the Court of Appeals said:[45]

> "Although modification of an agency's order under §6(c) of the Administrative Procedure Act results in the most efficient treatment of a partially void order, *it carries with it the imposition of penalties for prior non-compliance.*" (Emphasis supplied.)

The legislative history shows that the intent of Congress was exactly the opposite.

The House Report[46] stated:

> "• • • • The Section [6(c)] expressly recognizes the right of parties subject to administrative subpoenas to contest their validity in the courts *prior to subjection to any form of penalty* for non-compliance." (Emphasis supplied.)

The Senate Judiciary Committee in its Committee Print of June 4, 1945[47] stated:

> "• • • Subsection (c) is designed to • • • recognize that a private party may contest the validity of an administrative subpoena issued against him *prior to incurring penalties* for disobedience, since otherwise parties may in effect be deprived of all opportunity to contest the search

[45] R. 232.

[46] H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) reproduced in Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong. 2d Sess. (1946), at p. 265.

[47] Administrative Procedure Act, Legislative History, S. Doc. 248 79th Cong. 2d Sess. (1946), p. 27.

> or seizure involved. The 'haphazard' and often unfair methods of issuance of administrative subpoenas were recognized in the Final Report of the Attorney General's Committee (pp. 124-125, 414-415)." (Emphasis supplied.)

The section itself plainly provides that the only consequence of judicial enforcement of an agency subpoena or similar process is liability for punishment for contempt in case of contumacious failure to comply with the court order of enforcement. Long prior to the enactment of the Administrative Procedure Act, this Court held that an administrative agency had no power to punish non-compliance with its subpoena, and that penalties could not result from such non-compliance until a court held the subpoena valid, *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 477, 485, 489 (1894).

As the House and Senate reports show, the Congressional intent in enacting Section 6(c) of the Administrative Procedure Act was that no penalties should attach for pre-enforcement non-compliance, even where the agency process is not defective and is enforced as issued. Where the agency process is held to be defective and is not enforced as issued by the administrative agency, Congress did not intend that a party should be penalized for seeking judicial review.[48]

In *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), referring to an order to enforce a subpoena under Rule 17 of the Federal Rules of Civil Procedure, this Court said, at page 221:

> "One should not be held in contempt under a subpoena that is part good and part bad. The burden

[48] Section 6(b) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. §1005(b), also declares the congressional intent that no agency "process, requirement of a report, inspection, or other investigative act or demand shall be . . . enforced in any manner or for any purpose except as authorized by law."

> is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad."

When considering the extent to which the Commission's orders in the instant case were "good" or "bad" within the rule stated in *Bowman* it is to be kept in mind that the District Court held only 37% of the questions contained in the orders addressed to petitioner were required to be answered, including questions requiring the production of petitioner's retained file copies of Census Reports to the Census of Manufactures, which petitioner claims are privileged. (See *infra* under Point III.)

Following its statement that the order of the District Court modifying and enforcing partially void Commission orders carried with it penalties for non-compliance prior to judicial review, there is additional language which indicates that the Court of Appeals ignored certain of the uncontested conclusions of the District Court. The Court of Appeals also said:[49]

> "• • • A district judge might believe that the assessment of a forfeiture would be unfair in light of the substantial defects in the agency's order, and might thus be encouraged merely to deny the petition for mandamus thereby forcing the agency to re-issue the valid portions of its order. Whether, as a result of §6(c) of the Administrative Procedure Act, such a total refusal may be sustained is a question which hinges on the construction of the word 'subpoena' in the statute, and *we do not decide it here.*" (Emphasis supplied.)

The Court appears to be saying that if the word "subpena" in Section 6(c) includes a Federal Trade Commission investigative order, then a district court which

[49] R. 232.

finds such an order to be substantially defective cannot deny mandamus and dismiss the Government's action, but must enforce the valid portion under Section 6(c) of the Administrative Procedure Act. However, the Court of Appeals said, whether a Federal Trade Commission investigative order is included within the word "subpena", as used in Section 6(c), is a question which need not be decided in this case.

The Court of Appeals overlooked the fact that the District Court had decided the question. The District Court did not grant mandamus. By exercising power under Section 6(c) of the Administrative Procedure Act to modify and partially enforce the Commission's orders, the District Court necessarily held that the Commission's investigative orders were "subpenas or similar process or demand" for the purposes and within the terms of Section 6(c).

By its affirmance, the Court of Appeals must have accepted the District Court's characterization of the Commission's orders as "subpenas or similar process or demand" to find authority in Section 6(c) for the partial enforcement.

If, as the District Court expressly held and the Court of Appeals impliedly holds, a Federal Trade Commission investigative order is the equivalent of a "subpena" as that term is used in Section 6(c) of the Administrative Procedure Act, and if modification and enforcement of a "subpena or similar process or demand", pursuant to Section 6(c), carries with it penalties for prior non-compliance, then statutory forfeitures will be payable as a result of non-compliance with any partially enforced Commission investigative order, irrespective of the extent of its invalidity.

The Court of Appeals' effort to escape this harsh result by leaving open the question whether Federal Trade Com-

mission investigative orders are "subpenas" within the meaning of Section 6(c) was without effect, since that question had already been decided by the District Court.

The next sentence in the Court's opinion, which concludes the paragraph, again suggests that the Court of Appeals had overlooked the uncontested findings of the District Court. The Court said:[50]

> "* * * In view of the opportunity given to a respondent to attack an order requesting a special report by a declaratory-judgment proceeding, the exaction of the statutory penalties for non-compliance is fair in any case in which the respondent awaits a mandamus action before contesting the agency's demands, *and the order is held valid.*" (Emphasis supplied)

If, as the Court assumed, a recipient of a Federal Trade Commission investigative order could be liable for forfeitures prior to judicial review, then it would be true that failure to initiate review proceedings and obtain a stay would expose him to liability for penalties if he is wrong and the Commission's order is found valid.

But this is not a case where the Commission's orders were found "valid". Sixty-three percent (63%) of the questions addressed to petitioner were not enforced by the District Court; and the Government did not appeal from that finding. Thus, where, as here, the Commission's order is substantially defective, whether or not the recipient thereof instituted declaratory judgment proceedings and obtained a stay has no relevancy. Certainly, failure to obtain a stay should not be a reason for punishing a recipient for failing to comply with Commission orders which are found to have been substantially invalid.

[50] R. 232-233.

In the separate opinion of Circuit Judge Friendly, it was said, among other things:[51]

> "• • • I see little basis and less occasion for the statement that the availability of methods for securing an early determination of the validity of a direction under §6(b) of the Federal Trade Commission Act, pursuant to statutes passed long afterwards, necessarily renders exaction of the statutory penalties 'fair' in any case where the respondent has not chosen to use them. If he prefers to await suit and then succeeds in demonstrating such extensive invalidity that there is no longer an intelligible requirement for an 'annual or special report,' he is entitled to prevail. Per contra his utilization of the Declaratory Judgment Act or the Administrative Procedure Act will not avail him if he proves wrong, save, of course, for such periods as the direction has been stayed."

Additional support for the proposition that the Court of Appeals dealt with the forfeitures question without considering certain of the uncontested findings of the District Court is found in the Court of Appeals' comment:[52]

> "• • • The respondents cannot claim that theirs was merely an honest omission since they refused to accede to many of the Commission's requests for documents and information *on the sole ground that the Commission had no authority to demand what was requested.* That the respondent's recalcitrance was caused by a wrong guess on a disputed issue of law does not prevent it from being held to 'lawful consequences attached to the refusal'." (Emphasis supplied.)

The fact is that one of petitioner's principal objections to the original, unmodified orders was that they were

[51] R. 233.
[52] R. 230.

improper because they required the duplication of information previously furnished and that all of such objections were sustained by the District Court. Petitioner's "guesses" on issues of law were not "wrong".

It is petitioner's position that where an FTC investigative order is not enforced as issued, but, instead, is partially enforced by a District Court order made pursuant to Section 6(c) of the Administrative Procedure Act, the clear direction of the statute is that the party against whom such order is issued is not liable for any penalty unless and until the court order is disobeyed. If, however, it should be held that penalties for non-compliance prior to review are possible, we submit that the assessment thereof should not be mandatory, but should be discretionary with the District Court. Here the District Court exercised its discretion to declare petitioner not liable for penalties. For this reason alone, we respectfully submit, a reversal of the Court of Appeals' determination of petitioner's liability for forfeitures is fully warranted.

Furthermore, even if, *arguendo*, the Court of Appeals were correct in its holding that partial enforcement of an agency investigative order, pursuant to Section 6(c) of the Administrative Procedure Act, necessarily "carries with it" liability for penalties for prior non-compliance, the Court of Appeals should have remanded the case to the District Court in order to give that Court an opportunity to determine whether, in light of these adverse consequences (of which the District Court was unaware at the time it ordered partial enforcement), the District Court would order partial enforcement or dismiss the action and remand the matter to the Commission for further proceedings.

If the District Court were given the option either to grant partial enforcement with penalties or to dismiss and remand the action, thus requiring the Commission to issue orders in conformity with the Court's decision, it is

reasonable to assume, on the record here, that the District Court would have elected the latter course. The failure to remand turns on the Court of Appeals' erroneous holding that not only is the assessment of penalties mandatory when Section 6(c) is invoked, but that invocation of Section 6(c) is itself mandatory if any portion of the agency order, however slight, is enforceable, leaving no discretion for the trial court to dismiss the action and require a new Commission order.

II

The Commission's orders required "answers in writing to specific questions"; the $100 per day forfeiture provision of Section 10 of the FTC Act was, therefore, not applicable.

Section 6(b) of the FTC Act, under which the Commission issued its orders authorizes two different kinds of requirements: (1) "annual or special, or both annual and special, reports" and (2) "answers in writing to specific questions".

The third (unnumbered) paragraph of Section 10 of the FTC Act prescribes $100 per day forfeitures for the failure to furnish an "annual or special report". There is no such forfeiture provision for failure to furnish "answers in writing to specific questions". The sanction for that method of eliciting information, as we show below, is provided elsewhere in the Act.

There is a basic distinction between a requirement for the furnishing of "annual or special • • • reports" and a request for "answers in writing to specific questions". A requirement for a "report" indicates only the general nature of the contents of the report, giving the reporting corporation latitude in determining the specific information to be stated. It would presumably cover one of the several subjects listed in Section 6(b),

e.g. "organization", "business", some particular "conduct", "practices", "management" or a particular "relation" to other corporations. The reporting corporation is not required to deal with specific questions and is not required to determine the meaning of questions which it finds vague and uncertain or are otherwise improper.

Where "answers in writing to specific questions" are required—as in the case of subpoenas and similar process —the recipient of the order has no discretion. It must answer the precise questions stated.

Thus, except for the form of the process, an order requiring "answers in writing to specific questions" is substantially the same as a subpoena *duces tecum*. Indeed, by relying on Section 6(c) of the Administrative Procedure Act, the District Court necessarily equated the two. The problems of the recipient with respect to each are the same. The consequence of non-compliance should therefore be the same, and this is what the first (unnumbered) paragraph of Section 10 of the FTC Act provides.[53]

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[53] This paragraph reads as follows:

> "Any person who shall neglect or refuse to attend and testify, *or to answer any lawful inquiry* or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000 or by imprisonment for not more than one year, or by both such fine and imprisonment." (Emphasis supplied.)

Proceedings under this paragraph may be enjoined in order to permit the recipient to contest judicially the validity of the process, and penalties may not be incurred until a court order of enforcement has been disobeyed, *Federal Trade Commission* v. *Millers' National Federation*, 23 F. 2d 968 (D.C. Cir. 1927); and see *Federal Trade Commission* v. *Millers' National Federation*, 47 F. 2d 428 (D.C. Cir. 1931); see also *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363 (1942) involving a subpoena issued pursuant to Section 9 of the Fair Labor Standards Act (52 Stat. 1065 (1938), 29 U.S.C. §209 (1958) which incorporates by reference sections 9 and 10 of the FTC Act. See also *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 217 (1946).

The Court of Appeals, although recognizing that there is a difference between a requirement of a report and a request for "answers in writing to specific questions" said:[54]

> "On the facts of this case we cannot say that the orders directed at St. Regis were requests for 'answers to specific questions' rather than demands for reports. *The line between the two is, by the nature of each, quite indistinct.* • • •" (Emphasis supplied.)

It held that the orders in this case required "special reports" and that petitioner was therefore liable for the forfeiturers.

If, as held, the line between "reports" and "answers in writing to specific questions" is "quite indistinct", the issue should not have been resolved against petitioner so as to make the forfeiture statute applicable. Forfeiture statutes, being penal in nature, should be strictly construed. *United States* v. *One Ford Coach*, 307 U. S. 219, 226 (1939); *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 35 (1875); *Hannifin* v. *United States*, 248 F. 2d 173, 175 (9th Cir. 1957).

Furthermore even if, *arguendo*, the orders originally issued by the Commission required "reports", after the District Court struck out 63% of the questions and made its own order, nothing remained to be answered but a designated series of specific "questions" listed in the Court's order. The District Court said:[55]

> "St. Regis in its answer to the specifications takes great pains to point out the vast amount of information it has supplied for which the Commission

[54] R. 230.

[55] R. 210-211.

> gives no credit. After reading the answer, we saw merit in defendant's contention and found it necessary to go over the entire situation and come to our own conclusions as to what was answered by defendant, making use of the material supplied by St. Regis in its answer."

The Commission's original "orders" were completely superseded by the District Court's order. In *Flotill Products, Inc.* v. *Federal Trade Commission*, 278 F. 2d 850 (9th Cir.), *cert. denied*, 364 U. S. 891 (1960), referring to an order of the District Court which had modified a Federal Trade Commission investigative subpoena *duces tecum*, and, as modified, enforced it, the Court of Appeals said, at page 852:

> "Once the order of the trial court was entered, the hearing examiner's subpoena was superseded and became inoperative and irrelevant."

In any event, whether a court order or a Commission order, the resultant listing of hundreds of questions to be answered provided no resemblance to an "annual or special report" to which the statutory authority for $100 per day forfeitures relates.

So far as we are aware, the decision below is the first case holding that the $100 per day forfeiture provision of the third paragraph of Section 10 of the FTC Act applies to such a request for written answers to specific questions. The only other decision on this question was conceded by the Court of Appeals below to be to the contrary, *United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S.D. N.Y. 1938). The Court chose not to follow District Judge Woolsey's decision in that case. We submit that was error. There is little practical difference between a requirement for answers in writing to specific questions and a subpoena *duces tecum*, particularly where,

as in the instant case, a large part of the "questions" are really demands for documents.[56] They should both be enforced in the same manner.

III

Petitioner's retained file copies of reports to the Bureau of Census for the Census of Manufactures are not subject to the investigative process of the Federal Trade Commission.

The question whether retained copies of reports to the Bureau of the Census are amenable to the process of the Federal Trade Commission presents a square conflict between the circuits for resolution by this Court.

In *Federal Trade Commission* v. *Dilger*,[57] the Court of Appeals for the Seventh Circuit held that copies of such reports were beyond the reach of Federal Trade Commission process. Although the Solicitor General refused to sign the petition, the Commission petitioned for writ of certiorari without his approval. The Secretary of Commerce filed a memorandum in opposition. This Court denied the writ (No. 375, October Term, 1960).

The Court of Appeals below, however, expressly rejected the holding of *Dilger*.

We urge that the rule stated by the Court of Appeals for the Seventh Circuit is the correct rule and that this Court should reject the view expressed by the Court of Appeals below.

The statutory basis for the confidential treatment to be accorded copies of census reports is found in Sections 8 and 9 of the Census Act.[58]

Section 9 contains a general restriction on the use and publication of data furnished by any reporting person or

[56] See for example Question 1(a) of Order No. 1, R. 9.

[57] 276 F. 2d 739 (7th Cir.), *cert. denied*, 364 U. S. 882 (1960).

[58] 68 Stat. 1013 (1954), 13 U.S.C. §§8 and 9 (1958).

corporation. Section 8 contains the exceptions to the general prohibition and provides in subsection (c) thereof as follows:

> "In no case shall information furnished under the authority of this section be used to the detriment of the persons to whom such information relates."

Section 5 of the Census Act[59] confers broad authority upon the Department of Commerce to prescribe the form of the schedules.

The form of the report for the Census of Manufactures shows upon its face that it is a form originating with the Census Bureau. It states the following:

> "CONFIDENTIAL—This report should be returned WITHIN 30 DAYS OF ITS RECEIPT. This report is authorized by Act of Congress (13 U.S.C. 131) which requires that you file a report. Your report is confidential and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation, or regulation."

Across the bottom of the copy to be retained by the reporting manufacturer is the following legend, printed in bold type:

"KEEP THIS COPY FOR YOUR FILES"

In addition to the assurances of confidentiality contained in the statutes and in the forms issued pursuant to the Department's power to prescribe forms, similar pledges have been made in a presidential proclamation and in an opinion of the Attorney General. Thus a presidential proclamation dated November 22, 1929[60] contained the following statement:

> "The sole purpose of the Census is to secure general statistical information regarding the popu-

[59] 68 Stat. 1013 (1954), 13 U.S.C. §5 (1958).
[60] 46 Stat. 3011, 3012.

lation and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required. The Census has nothing to do with taxation, with military or jury service, with the compulsion of school attendance, with the regulation of immigration, or with the enforcement of any national, state, or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs. For the due protection of the rights and interests of the persons furnishing information every employee of the Census Bureau is prohibited, under heavy penalty, from disclosing any information which may thus come to his knowledge."

See also 36 Ops. Atty. Gen. 362 (1930).

Against this background the Court of Appeals for the Seventh Circuit in *Dilger* unanimously held that the privilege attaches to the copies of the reports retained by the reporting corporation as well as to the original report submitted to the Census Bureau. In the opinion by Chief Judge Hastings the Court said (276 F. 2d 739, at p. 743):

"The Commission argues that the foregoing documents relate solely to information in the possession of the Census Bureau and to disclosure by officials and employees of that Bureau. It contends they have no application to retained copies in the custody of the informant. In effect, the Commission concedes that it could not enforce a subpoena against the Census Bureau and require the production of the original schedule on file there. *It seeks now to do indirectly that which it cannot do directly.* We cannot believe the Congress intended such a result."

* * * * *

"* * * To hold to the contrary, we believe, would run counter to the Congressional purpose of the Census Act and the assurances given by the Gov-

> ernment to the public. These assurances of confidentiality and protection constitute a pledge of good faith on the part of the Congress, the President and the Department of Commerce. We do not think that another arm of the Government (the Federal Trade Commission) can be heard to say that such representations may be avoided in this indirect manner. The United States has given its word and should be permitted to keep it." (Emphasis, the Court's.)

The Court of Appeals below chose to disagree with *Dilger*, relying on an analogy to cases which hold that copies of income tax return in the taxpayer's files are subject to subpoena.

The attempted analogy to retained copies of income tax reports is fallacious. Section 6103 of the Internal Revenue Code of 1954[61], to which the Court of Appeals referred in its decision, provides that originals of income tax returns "may be inspected upon the order of the President." There is no similar provision in the Census Act. There is a conflict of authority on the question whether this section of the code subjects retained copies in the hands of the taxpayer to the process of administrative agencies;[62] and it does not appear that this Court has ruled upon the question.

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[61] 26 U.S.C. §6103 (Supp. II, 1958).

[62] In *United States* v. *O'Mara*, 122 F. Supp. 399 (D.C. 1954), cited by the Court of Appeals below in support of the non-confidentiality of retained copies of income tax returns, Judge Holtzoff, noting that "this question has not been determined by any appellate court" said (at page 400):

> "The question is a close one, and a debatable one. On the one hand it may be argued that the statute creates a privilege and gives a privileged status to income tax returns similar to that of communications between attorney and client, and other privileged communications, and, if this is the case, the privilege would extend to copies as well as to originals, for surely carbon copies of communications between attorney and client, if the originals are confidential, would not be subject to disclosure."

Maddox v. *Wright*, 103 F. Supp. 400 (D. C. 1952);
O'Connell et al. v. *Olsen & Ungelstadt et al.*, 50-2 USTC 9450 (N.D. Ohio 1949).

Furthermore, there is a clear distinction between income tax returns which are carefully reviewed by accountants and counsel before submission and census reports which are prepared with only sufficient accuracy to meet the needs of the estimates made by the Bureau of the Census. If the information submitted in a census report is to be available to the Federal Trade Commission, many if not most of the items on the report forms could not be answered without a specific reservation as to the accuracy of the answer; and all of the items would have to be cleared by corporate officials, auditors and counsel. The procedure used in preparing the Census reports is described in the "Memorandum For the Secretary of Commerce" submitted in opposition to the petition for a writ of certiorari in *Dilger:*

> "Business records are kept for many purposes, but the need for providing precise, prompt, and accurate replies to inquiries from the Bureau of Census is a need which may be assigned little priority by the company in determining how its records are to be kept. In such cases, the immediate answer to such inquiries is then that the records do not provide the desired information or that final compilations will not be available until some time in the future. An analyst of the Bureau of the Census who is familiar with the particular industry then undertakes to work out, with his opposite number in the reporting company, an estimate based on information in the records as kept. Experience has shown that the technician of the Bureau of the

Census, because of his knowledge of the industry under consideration, may question some estimates as unrealistic and request consideration of other factors before an estimate is agreed upon.

"This technique of developing information is described in some detail to demonstrate how inappropriate it would be to require these figures for the different purposes of the regulatory agency and more importantly to show how helpless the Bureau of the Census would be in its quest for data once it becomes established that these estimates are available to regulatory agencies. Then the answer, that the records of the company do not provide the information requested by the Bureau of the Census, will become the final answer. This concern is not mere speculation but is based on statements by officials of reporting companies made after the decision of the District Court in this cause."

In *Dilger*, Chief Judge Hastings expressly rejected the analogy to the production of copies of income tax returns relied upon by the court below. The Court noted the differences in the statute which expressly provides for the production of tax returns when authorized by the President and pointed out the absence of any similar authority in the Census Act, saying (276 F. 2d 739 at pp. 743-744):

"We do not believe this asserted parallel runs true. Cases holding that copies of income tax returns can be produced involve an entirely different statute and Congressional purpose. Under the provisions of 26 U.S.C.A. §6103 there is Congressional authority whereby such tax returns may be made available. With limited exceptions found in Section 8, there is no such authority given in the Census Act. As Mr. Justice Frankfurter said in *Federal Trade Commission* v. *Bunte Bros.*, 312

> U. S. 349, 353 (1941), 'Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business.'"

In *Dilger*, reference was also made to the opinion of District Judge Weinfeld in *United States* v. *Bethlehem Steel Corporation*, 21 F.R.D. 568 (S.D. N.Y., 1958). That was an action to enjoin the defendants from proceeding with a proposed merger, alleged to be in violation of the Clayton Act. The United States applied for an order to require the production of reports to the Department of Commerce, Bureau of the Census. The companies did not oppose the production of the copies of the reports and urged as a condition that the United States be required to supply the companies with copies of similar reports filed by other major steel producers. The Census Bureau refused to make this information available to the Department of Justice or to any other person. Judge Weinfeld held that the United States could not be required to supply defendants with copies of census reports by other major steel producers, because such reports were confidential under the statute. He gave careful consideration to the statute and its legislative history. In concluding that the information furnished the Census Bureau is privileged, he said (at p. 570):

> "One need not probe far to understand that when Congress imposed upon citizens the duty of disclosing information of a confidential and intimate nature, its purpose was to protect those who complied with the command of the statute. Apart from giving assurance to citizens that the integrity of the information would be preserved by the Government, another purpose was to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interests. Accordingly,

> Congress created a privileged status as to the information furnished to the Census Bureau and directed its confidential treatment so as to prevent misuse."

If the Commission's request for petitioner's retained copies of its reports to the Census Bureau is upheld here, then the Commission may be permitted to obtain indirectly what it could not obtain directly. That, we submit, would defeat the legislative purposes as clearly expressed in the statute. The interference with the operation of the Bureau of the Census is shown by the memorandum for the Secretary of Commerce, submitted in opposition to the petition in *Dilger*, in which it was said:

> "Distinctions which may be drawn between the confidentiality which may attach to the original schedule filed by a company reporting and copies thereof retained in accordance with the express request of the Bureau of the Census by a company reporting are unwarranted in so far as the significance of confidentiality is concerned as it affects the operation of the program of censuses. In so far as integrity of data making up the statistics, and necessary cooperation between the company reporting and the Bureau of the Census are concerned, knowledge that either the original or copies, retained or otherwise, of schedules are to be available for scrutiny by regulatory agencies produces the same imposing handicaps to the Department in its administration of the program of censuses. If the retained copy is available, it does not matter to any of the interested parties that the original is not so available. (Of course, the company's own records and data, on the basis of which the reports are prepared, are not immune from subpoena.)
>
> "The importance of the retained copy of such a schedule to the Bureau of the Census should be stressed. This copy serves as a reference point for

discussion between the Bureau of the Census and the company reporting. This is true not only of a current census but also of a subsequent census and of intermediate surveys which may be undertaken. In light of the aim for current data and statistics the importance of a readily available reference is apparent. This copy in the hands of the company reporting is more important to the Bureau of the Census, therefore, than to the company. It is for these reasons that the Census Bureau requests that a copy be retained by the reporting companies; and its promise of confidential treatment of the information contained therein is intended to cover such copy, as well as the original.

* * *

"Finally, copies of schedules should not be made available because the Department of Commerce should not be prevented from keeping its word to companies reporting when the Department has promised that the report cannot be used for purposes of taxation, investigation, or regulation. This promise parallels the promise of the President set forth in the opinion of the Court of Appeals based on Section 9 of the Census Act, which is applicable to both censuses of population and housing and censuses of business and manufactures since both are taken under authority of Title 13 of the United States Code. * * *

"The completeness, accuracy, and timeliness of the statistical reporting system of the Bureau of the Census are founded on cooperation by the reporting companies. This cooperation is obtained by pledging the confidentiality of the relationship between the reporting companies and the Bureau of the Census. No threat of punishment or penalty can substitute for the cooperation now obtained through confidentiality; certain of the reports, obtained on a voluntary basis, are not subject to penal provisions for failure to file a report. To intrude into this relation-

> ship is to destroy it and thereby seriously impair the ability of the Bureau of the Census to furnish the people and their government necessary measures of the social and economic conditions of the United States."

The opinion and decision of Chief Judge Hastings in *FTC* v. *Dilger, supra,* reflects the accurate, careful consideration of the Census Act, its purposes and the interpretation of the statute by the Government over a period of years.

This Court should resolve the conflict between the decision below and in *Dilger* by adopting the conclusion reached by the Court of Appeals for the Seventh Circuit in *Dilger.*

IV

Section 6(b) of the Federal Trade Commission Act as applied by the Commission deprives petitioner of its liberty and property without due process of law.

Three days after the commencement of this action petitioner filed a motion in the District Court to dismiss the complaint on the grounds that Section 6(b) of the FTC Act, as applied by the Commission, is unconstitutional, in that it permits the Commission to issue investigative orders which may not be reviewed unless the recipient of the order is willing to await enforcement proceedings and risk having to pay forfeitures accumulating at the rate of $100 per day during the entire period of judicial review in the event the recipient's objections are not sustained. The motion was denied.[63] At the trial and again in the Court of Appeals petitioner unsuccessfully urged the same constitutional objection.

[63] 24 F.R.D. 366 (S.D. N.Y. 1959).

Throughout, petitioner has relied on a line of cases which hold that judicial review conducted under the coercive influence of liability for mounting penalties is a denial of due process.

Natural Gas Co. v. *Slattery*, 302 U. S. 300 (1937);
Oklahoma Operating Co. v. *Love*, 252 U. S. 331 (1920);
St. Louis, Iron Mountain & Southern Ry. Co. v. *Williams*, 251 U. S. 63 (1919);
Wadley Southern Ry. Co. v. *Georgia*, 235 U. S. 651 (1915);
Missouri Pacific Ry. Co. v. *Tucker*, 230 U. S. 340 (1913);
Ex parte Young, 209 U. S. 123 (1908).

The Court of Appeals below said:[64]

> "Respondents further urge that infliction of the penalty would violate the due process clause of the Fifth Amendment since they would be unable, under *FTC* v. *Claire Furnace Co.*, 274 U. S. 160 (1927), to test the validity of the order save by awaiting and defending the suit in mandamus, with penalties accumulating all the while. If judicial review were in fact limited to enforcement proceedings instituted by the Commission, and a daily forfeiture were collected for a failure to comply, the procedure might not meet the established standards of due process. Cf. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920) • • •"

The Court of Appeals held,[65] however, that one of the premises of petitioner's constitutional argument could not be supported, namely that petitioner had to await enforcement proceedings in order to test the lawfulness of the Commission's orders.

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[64] R. 231.
[65] R. 231-232.

Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160 (1927), a case which has never been overruled by this Court, holds that the recipient of a Federal Trade Commission Section 6(b) order cannot enjoin enforcement thereof, but must await the institution of enforcement proceedings by the Attorney General. The Court of Appeals, held for the first time that the subsequent enactment of the Declaratory Judgment Act and the Administrative Procedure Act had vitiated *Claire Furnace* and that petitioner should have instituted an action for judicial review under these Acts. The Court also said:[66]

> "• • • it is only if such a remedy is available that the forfeiture sanction can withstand attack on due process grounds."

On the basis of this novel ruling petitioner immediately moved in the Court of Appeals, pursuant to the Administrative Procedure Act, Section 10(d), for an order postponing the effective date of the Commission's action pending conclusion of judicial review. The Court of Appeals denied the motion, but granted a stay of its mandate until this Court could consider petitioner's petition for a writ of certiorari.[67]

The motion to postpone the effective date of the Commission's actions was renewed in this Court concurrently with the filing of the writ of certiorari. The motion was granted only to the extent of tolling the forfeitures from the date of the filing of the petition to the completion of review in this Court.[68]

If *Claire Furnace* is a correct statement of the applicable rule and petitioner must await mandamus proceedings in order to test the legality of the Commission's actions,

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[66] R. 232.
[67] R. 235.
[68] R. 238.

then the Federal Trade Commission Act, as applied by the Commission, deprives petitioner of its liberty and property without affording it an opportunity to test the legality of such actions except under conditions which do not meet minimum requirements of due process.[39]

If, on the other hand, *Claire Furnace* has, in effect, been overruled, and the recipient of a Federal Trade Commission investigative order can take action under the Administrative Procedure Act, then it was error for the Court of Appeals to have denied petitioner's motion under Section 10(d) of the Administrative Procedure Act for an order postponing the effective date of the Commission's action; and, when the motion was renewed here, this Court should have granted the relief requested.

If it be argued that petitioner should have moved for a postponement of the effective date of the Commission's action at an earlier date, it should be noted that Section 10(d) of the Administrative Procedure Act does not specify when the motion shall be made. It provides as follows:

> "• • • Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

The Commission, it should be noted, encouraged petitioner to refrain from taking action under the Administrative Procedure Act by urging the validity of *Claire Fur-*

[39] See authorities cited, *infra*, page 37.

nace. In a communication replying to an inquiry from petitioner's counsel immediately proceeding the commencement of the Government's action, the Commission's General Counsel stated that it would resist any action which petitioner might commence on the authority of that case.[70]

Petitioner respectfully submits that *Claire Furnace*, barred the commencement by the petitioner of an action under the Administrative Procedure Act or the Declaratory Judgment Act and that, accordingly, it could test the validity of the orders which were addressed to it only by awaiting mandamus proceedings while forfeitures were accumulating, a condition not meeting the requirements of due process.

If, however, this Court should now hold that *Claire Furnace* is or has been overruled and does not reverse the decision below, then petitioner respectfully urges that this Court also reconsider its decision on petitioner's motion which petitioner filed on February 7, 1961, and that upon such reconsideration it grant petitioner all of the relief requested, namely, postponement of the effective date of the Commission's actions until the completion of judicial review by this Court.

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[70] R. 200. Moreover, until it filed its answering brief in the Court of Appeals, the Government had argued that *Claire Furnace* stated the applicable rule and that petitioner had no remedy either under the Administrative Procedure Act or the Declaratory Judgment Act. In the Government's main brief in the Court of Appeals, at page 23, it was said:

> "Since *Claire Furnace*, which has never expressly been overruled or limited, holds that the enforcement proceedings *are* such an adequate remedy at law it would appear that review under the Administrative Procedure Act is inapplicable. And this would appear to hold good for the Declaratory Judgment Act, as well, since that statute requires a 'case of controversy' —and as *Claire Furnace* makes clear, there is no case of controversy before the United States exercises its independent judgment as to whether to bring enforcement proceedings * * * [citing cases]."

CONCLUSION

The judgment of the Court of Appeals should be reversed and the complaint dismissed on the merits, or if not dismissed and the judgment of the District Court is not reinstated, then the effective date of the Commission's orders should be postponed to preserve the status and petitioner's rights pending conclusion of the Court review proceedings.

Respectfully submitted,

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APPENDIX A

TEXTS OF RELEVANT STATUTES

Administrative Procedure Act

Section 6

60 Stat. 240 (1946); 5 U.S.C. §1005(b) and (c) (1958)

"(b) Investigations.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

"(c) Subpenas.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."

Appendix A

SECTION 10

60 Stat. 243 (1946), 5 U.S.C. §1009 (1958)

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires

by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing

court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Census Act

Section 5

68 Stat. 1013 (1954); 13 U.S.C. §5 (1958)

"Sec. 5. *Schedules; number, form, and scope of inquiries.*

"The Secretary shall prepare schedules, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title."

Section 8

68 Stat. 1013 (1954), 13 U.S.C. §8 (1958)

"(a) The Secretary may, upon a written request, and in his discretion, furnish to Governors of States and Territories, courts of record, and individuals, data for genealogical and other proper purposes, from the population, agriculture, and housing schedules prepared under the authority of subchapter II of chapter 5, upon the payment of the actual, or estimated cost of searching the records and $1 for supplying a certificate.

"(b) The Secretary may furnish transcripts or copies of tables and other census records and make special statistical compilations and surveys for State of local officials, private concerns, or individuals upon the payment of the actual, or estimated cost of such work. In the case of non-profit organizations or agencies the Secretary may en-

gage in joint statistical projects, the cost of which shall be shared equitably as determined by the Secretary and provided that the purposes are otherwise authorized by law.

"(c) In no case shall information furnished under the authority of this section be used to the detriment of the persons to whom such information relates.

"(d) All moneys received in payment for work or services enumerated under this section shall be deposited in a separate account which may be used to pay directly the costs of such work or services, to repay appropriations which initially bore all or part of such costs, or to refund excess sums when necessary."

SECTION 9

68 Stat. 1013 (1954), 13 U.S.C. §9 (1958)

"SEC. 9. Information as Confidential; exception

"(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

"(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

"(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

"(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

"(b) The provisions of subsection (a) of this section relating to the confidential treatment of data for particular individuals and establishments, shall not apply to the censuses of governments provided for by subchapter III of chapter 5 of this title, nor to interim current data provided for by subchapter IV of chapter 5 of this title as to the subjects covered by censuses of governments, with respect to any information obtained therefor that is compiled from, or customarily provided in, public records."

FEDERAL TRADE COMMISSION ACT

SECTION 6

38 Stat. 721 (1914), 15 U.S.C. §46 (1958)

"SEC. 6. That the commission shall also have power—

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

"(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, fur-

nishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

"(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

"(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

"(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

"(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

"(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

"(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable."

SECTION 9

38 Stat. 722 (1914), 15 U.S.C. §49 (1958)

"SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and mem-

bers and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any

person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

"Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

SECTION 10

38 Stat. 723 (1914), 15 U.S.C. §50 (1958)

"SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon

conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000 or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance

of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

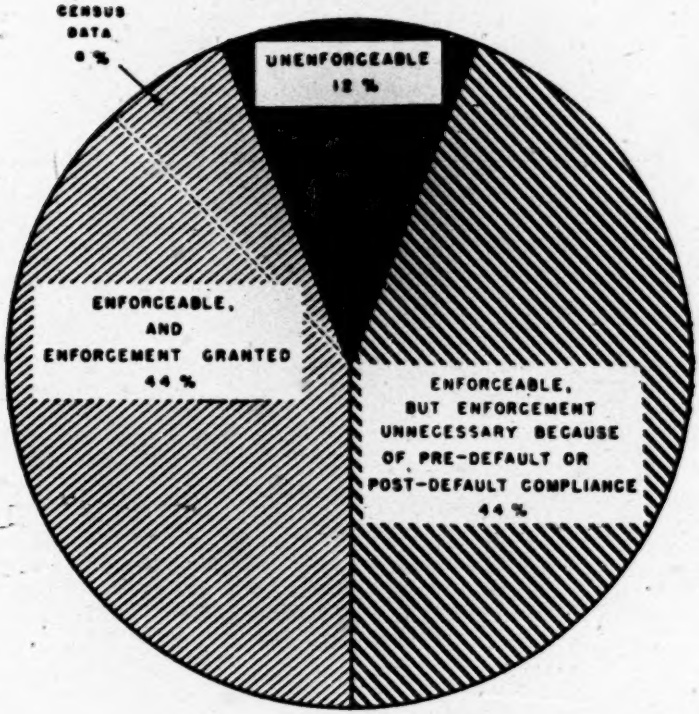
"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court."

APPENDIX B

Graphs Reproduced from Appendix to Government Brief in the Court of Appeals

FIGURE 1:

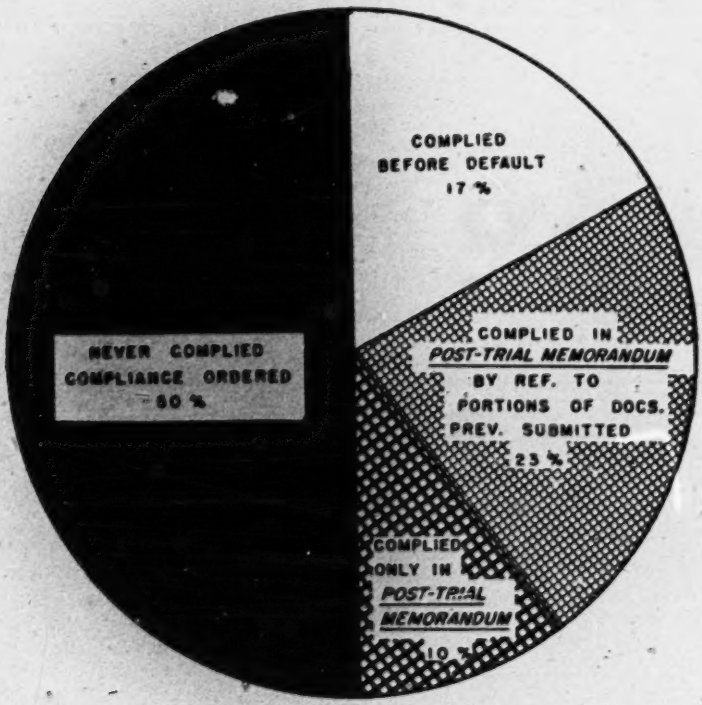
Proportions of enforceable and unenforceable questions in orders 1 through 9


CENSUS DATA 0 %
UNENFORCEABLE 12 %
ENFORCEABLE, AND ENFORCEMENT GRANTED 44 %
ENFORCEABLE, BUT ENFORCEMENT UNNECESSARY BECAUSE OF PRE-DEFAULT OR POST-DEFAULT COMPLIANCE 44 %

Appendix B

FIGURE 2:

How St. Regis complied with the enforceable questions in orders 1 through 9



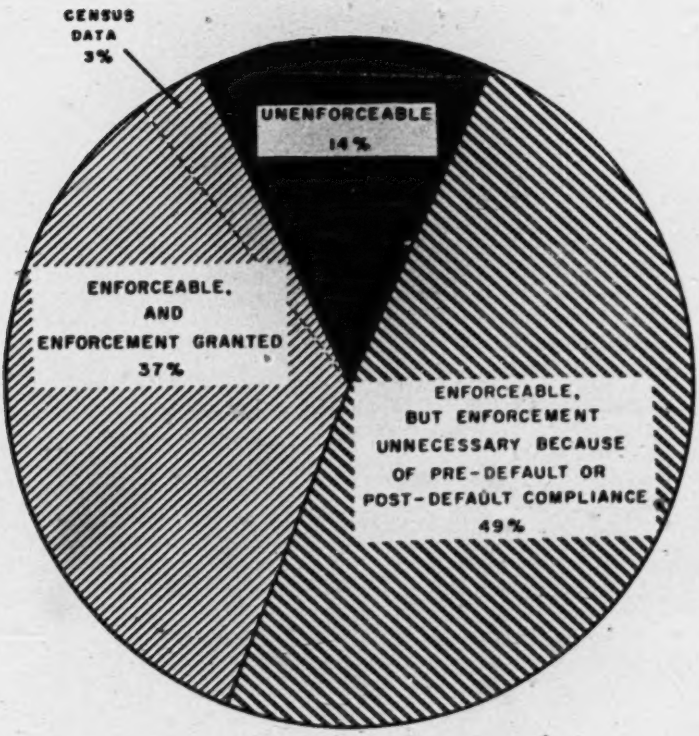
Source: Totals in Table A.

[Note: Category entitled "Complied Only in Post-Trial Memorandum 10%" refers to questions which petitioner's post-trial memorandum pointed out either (a) had no application to petitioner's business or (b) required "information . . . contained at a certain page of some annual report or prospectus" which petitioner had previously furnished (Government brief in the Court of Appeals, filed by the Government with this Court, p. 11, footnote 22).]

Appendix B

FIGURE 3:

Portions of enforceable and unenforceable questions in orders 1 and 7


CENSUS DATA 3%
UNENFORCEABLE 14%
ENFORCEABLE, AND ENFORCEMENT GRANTED 37%
ENFORCEABLE, BUT ENFORCEMENT UNNECESSARY BECAUSE OF PRE-DEFAULT OR POST-DEFAULT COMPLIANCE 49%

SOURCE: TOTALS IN TABLE A.

Appendix B

FIGURE 4:

How St. Regis complied with the enforceable questions in orders 1 and 7

SOURCE: TOTALS IN TABLE A.

[NOTE: Category entitled "COMPLIED ONLY IN POST-TRIAL MEMORANDUM 23%" refers to questions which petitioner's post-trial memorandum pointed out either (a) had no application to petitioner's business or (b) required "information . . . contained at a certain page of some annual report or prospectus" which petitioner had previously furnished (Government brief in the Court of Appeals, filed by the Government with this Court, p. 11, footnote 22).]